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No. 85-1884

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

HUNT INTERNATIONAL RESOURCES CORPORATION, GREAT WESTERN UNITED CORPORATION, THE GREAT WESTERN SUGAR COMPANY, WESTERN INVESTMENT COMPANY, N. BUNKER HUNT and W. HERBERT HUNT,

Petitioners,

vs.

W. C. and KENNETH STREY, a partnership on behalf of itself and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where the district court determines not only that a plaintiff's prayer for punitive damages was made in good faith but that the prayer was valid and in fact upholds a jury award of substantial punitive damages, and the Court of Appeals agrees that the punitive damages prayer was made in good faith but determines that the claim on which the prayer of punitive damages was based is invalid, was the Court of Appeals correct in refusing to oust the district court of jurisdiction over the claims of part of the class in a new trial on remand?

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The respondent W. C. and Kenneth Strey, on behalf of the approximately 3,500 similarly situated sugarbeet growers it represents, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 749 F.2d 1437 (10th Cir. 1984).

STATEMENT OF CASE

Respondent is a father-son Nebraska farming partnership. It is one of approximately 3,500 growers that entered into a standard-form 1974 Sugarbeet Contract with petitioner The Great Western Sugar Company ("GWS"), and represents all GWS growers in a five-state area in this class action. The Contract at issue in this case is a unique, "participating" contract in which the growers produce beets at their own expense and deliver them to GWS. GWS refines the beets into sugar at its own expense, and GWS then sells the sugar as it sees fit. Under the Contract, the growers receive approximately 62% and GWS approximately 38% of the "net return" from the sale of the sugar. The parties stipulated below that total control over selling the sugar is vested in GWS—the growers have absolutely no ability to influence or control the marketing process. Once the grower delivers his beets to GWS, he is totally dependent on GWS to act in good faith to get the highest possible net return for the sugar. Indeed, GWS stipulated before trial that it had a duty to respondent (and all growers) to act in good faith in performance of the 1974 Sugarbeet Contract.

Beginning in January 1975, GWS, under the direct and active supervision of petitioners Herbert and Bunker Hunt, began using a $10 million fund to establish large "short" positions in the sugar futures market,[1] which were initially described as "hedges" of GWS's sugar inventory. Between January and June of 1975, GWS and a subsidiary to which

[1] A "short" position is the selling side of an open futures contract. A short position becomes profitable when the price of the futures contract moves lower than the initial sale price; a short position becomes unprofitable when the price of the futures contract moves higher than the initial sale price.

it transferred GWS sugar futures positions realized over $61 million in net profits as a result of the short sugar futures transactions due to the drastic decline in sugar prices during the period.

At the same time, the Hunts were directly controlling the sales and marketing of the sugar inventory of GWS, despite a complete absence of any prior experience or expertise in the marketing of sugar. As a result of the control by the Hunts, GWS (which the year before had the second highest net return of any beet sugar company in the United States) finished dead last among all sugarbeet companies in the United States in the average price received for sugar in 1974-75, at a loss to the growers in excess of $17 million when compared to a close competitor.

This class action suit was filed in the United States District Court for the District of Colorado in May 1978. The growers premised federal question jurisdiction under 28 U.S.C. §§ 1331 and 1337 on their claim that defendants' conduct violated the antifraud provisions of the Commodities Exchange Act, 7 U.S.C. § 6b. The growers also alleged diversity jurisdiction under 28 U.S.C. § 1332 for various state law claims. After approximately two years of proceedings, the district court dismissed the growers' Commodities Exchange Act claim on the ground that there was no private right of action under the Act. Subsequently, the district court (in accordance with the dictates of *Zahn v. International Paper Co.*, 414 U.S. 291 (1973)) certified a class of all growers with over $10,000 in controversy when taking into account the punitive damages prayer. The district court at that time determined that the punitive damages prayer had a sufficient basis in law and fact and accordingly rejected defendants' vociferous contentions that

the prayer for punitive damages was made in bad faith solely for the purpose of acquiring federal jurisdiction. (Appendix A-1-1).

In a subsequent mandamus proceeding by which defendants sought unsuccessfully to have the class of growers decertified, defendants did not challenge the district court's inclusion of the punitive damages prayer for purposes of determining jurisdiction or certifying the class. Thereafter, the district court determined that the punitive damages prayer was sufficiently meritorious to warrant submission to the jury, and the jury in fact awarded substantial punitive damages of approximately $13.6 million after a four week trial.

At trial, the growers asserted various claims related to the sugar futures trading and the sales and marketing of sugar during 1975. First, the growers contended that the sugar futures trades, if "hedges" of the sugar inventory, served to establish the price of the sugar and that the $61 million from the hedge positions should have been included in calculating the average net return, with the result that the growers would have received 62% of the profits (some $38 million). The jury decided against the growers on this issue.

Second, the growers argued that GWS breached a duty of good faith owed to the growers in connection with the sales and marketing of sugar. The growers argued, among other things, that if the sugar futures trades were speculations or were for the sole account of defendants, then a conflict of interest existed. Contrary to petitioners' suggestion, this claim was not in essence that GWS merely had not sold the refined sugar at the best times of the year. Rather, since it was the undisputed obligation of GWS to

secure the highest price possible for the sugar inventory on behalf of the growers, and since it was also undisputed that the short positions became profitable only in the event of significant and substantial declines in sugar prices, the growers argued that the short sugar futures positions created an inherent conflict of interest whereby the defendants' huge financial interest in *lower* prices compromised their good faith duties to the growers to receive higher prices for the sugar inventory—the defendants just didn't care if the prices went down. In addition, the growers pointed to the Hunts' interference with the marketing of sugar, the Hunts' holding up price changes until they finished trading futures, the loss of sales during early 1975 when prices were high due to the Hunts' interference with marketing decisions, the refusal of the Hunts to permit the head of marketing to hedge the inventory himself, and other matters. The jury found that GWS had breached its good faith duties, and awarded the growers damages of $11.8 million for this claim.

Third, the growers argued that GWS's unfettered discretion and control over the sale and marketing of sugar, the fact that 62% of the net return from the sugar was payable to the growers and the fact that the sole means by which the growers could be paid for their beets was the marketing efforts of GWS, gave rise to a fiduciary or confidential duty owed by GWS to the growers in connection with the sale and marketing of sugar. The growers alleged that this duty existed and that it was breached, and further alleged that defendants' bad faith, their misrepresentations to the growers, their pre-litigation threats to "spend the growers to death" and other conduct warranted the imposition of substantial punitive damages. The jury found that a confiden-

tial or fiduciary duty was owed, that the duty was breached, and awarded actual damages of $11.4 million. The jury also found that the breach was such as to warrant punitive damages beyond a reasonable doubt (the standard of proof under Colorado law), and assessed a total of $13.6 million in punitive damages.

The growers also sought to impose liability upon defendants other than GWS through the alter ego doctrine. The jury found that all of the other defendants, most notably the Hunts, were liable to the growers under the alter ego or instrumentality theory. On post-trial motions, the trial court refused to set aside any of the jury's findings.

On appeal, the Tenth Circuit concluded that the Sugarbeet Contracts were "typical sales contracts" that "are not unusual." 749 F.2d at 1439 (Appendix A-2-2). The court, substituting its view of the evidence for that of the jury, held that "the contract provisions do not create a fiduciary duty and the evidence showed that none otherwise existed." 749 F.2d at 1440 (Appendix A-2-4). It concluded that the trial court should have granted a directed verdict for the defendants on the fiduciary duty issue, despite the fact that the defendants did not properly move for a directed verdict. The court, having reversed the jury's findings of the existence and breach of the fiduciary duty, also reversed the related awards of punitive damages and prejudgment interest.

The Tenth Circuit was careful, however, to reject defendants' argument that the prayer for punitive damages was made in bad faith and therefore could not be counted for purposes of determining subject matter jurisdiction. It agreed with the district court that the prayer for punitive damages had been made in good faith and ruled that its

own holding regarding the invalidity of the breach of fiduciary duty claim, which the growers had no reason to forsee at the time they filed suit, was not grounds to oust the jurisdiction of the district court over the trial on remand. 749 F.2d at 1441 (Appendix A-2-8).[2] Defendants never argued —and the Tenth Circuit never held—that to a legal certainty punitive damages were not recoverable in this action. Nor did defendants seek rehearing before the Tenth Circuit to raise the issue asserted, for the first time, in their petition for a writ of certiorari after the refusal of the punitive damages award.

The Tenth Circuit remanded the action for a new trial on the breach of contract claim, which is presently scheduled for March 1987. The growers' timely petition for rehearing and rehearing en banc on the breach of fiduciary duty and the remand issues, filed in December 1984, was not denied until February 1986.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE TENTH CIRCUIT CORRECTLY APPLIED THE APPLICABLE LONG-STANDING DECISION OF THIS COURT AND IS IN ACCORD WITH THE DECISIONS OF OTHER CIRCUITS ON AN ISSUE THIS COURT HAS ALREADY ADEQUATELY ADDRESSED.

With rhetoric which betrays a lack of careful analysis, petitioners urge the Court to grant certiorari in order to rescind the open invitation allegedly extended by the Tenth Circuit to use invalid punitive damages claims as a basis for diversity jurisdiction. According to petitioners, the

[2]The court also affirmed the decision below regarding the liability of all defendants other than GWS for the conduct in question as mere alter egos or instrumentalities. 749 F.2d at 1441 (Appendix A-2-8).

Tenth Circuit has misapplied the Court's precedents and is in conflict with the decisions of other Courts of Appeals. Neither allegation is true. The Tenth Circuit correctly applied this Court's teaching on an issue it fully and adequately considered and decided almost fifty years ago. Moreover, the decision of the Tenth Circuit is in accord with the decisions of other circuits. Even the premise on which the petition rests—that the Tenth Circuit determined to a legal certainty that the growers cannot recover punitive damages in this action—is not true. Simply put, floodgates to unwarranted diversity actions have not been opened by the Tenth Circuit and are not at issue here. Accordingly, the Court should deny the petition for a writ of certiorari.

I.

The Tenth Circuit Correctly Applied The Rule Of *St. Paul Mercury*

Petitioners' contentions are based on a substantial misapprehension of the controlling standards set forth by the Court in *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), and consistently and fairly applied by the Court and the lower courts on numerous occasions since. Contrary to petitioners' suggestion, the Court in *St. Paul Mercury* did not adopt a rigid rule requiring the dismissal of every action in which it is found at some point subsequent to filing that the plaintiff will not recover the requisite amount in controversy. Instead, the Court established a standard which focuses on the good faith of the plaintiff in making a claim sufficient to satisfy the amount in controversy requirement for diversity jurisdiction.

The Court in *St. Paul Mercury* began by acknowledging

that "[t]he intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts." 303 U.S. at 288. The Court went on to hold, however, that

> [t]he rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, *the sum claimed by the plaintiff controls if the claim is apparently made in good faith.* It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. *The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction.*

Id. at 288-89 (emphasis added and footnotes omitted). The crucial issue in the determination is not the recoverability of certain damages but the good faith of the plaintiff at the initiation of the lawsuit in claiming such damages.

The good faith standard is not a toothless, subjective test. Indeed, the Court was careful in *St. Paul Mercury* to adopt objective criteria as the yardstick for determining whether the requisite good faith was present at the time the claim was made:

> But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed, or if, from the proofs, the court is satisfied to a like certainty that the plaintiff *never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction,* the suit will be dismissed.

Id. at 289 (emphasis added and footnote omitted). In other words, the Court made it clear that while "[e]vents occurring subsequent to the institution of suit which reduce the

amount recoverable below the statutory limit do not oust jurisdiction," *id.* at 289-90 (footnote omitted), if it is found that the facts and the law indicated to a legal certainty *at the time the action was brought* that the damages claimed could never be recoverable, then it can be said as a matter of law that the claim was not made in good faith, was "colorable" for the purpose of conferring jurisdiction and therefore should be dismissed.

As is readily apparent from the above-quoted passages, the suggestion by petitioners that "[r]esort to a 'good faith' assessment is thus necessary only when 'legal certainty' is not present," Petition at 9, is a substantial misrepresentation of the standard so carefully crafted by the Court in *St Paul Mercury*. "Legal certainty" that a particular category or amount of damages is not recoverable is not the end of the determination, but rather is merely one method by which a plaintiff's good faith in asserting that a certain amount is in controversy can be determined. Subsequent decisions of the Court adhere to this analysis. *E.g., Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348, 353 (1961) ("The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith' "); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 642 n.10 (1975) (reaffirming test as articulated in *St. Paul Mercury*).

Petitioners have never denied that punitive damages are includable in determining whether the amount in controversy requirement has been met, nor could they. *Bell v. Preferred Life Assurance Society*, 320 U.S. 238, 240 (1943). Similarly, petitioners have never denied that punitive damages may be recovered under Colorado law for a

breach of fiduciary duty. *Holter v. Moore & Co.*, 681 P.2d 962, 966 (Colo. App. 1983); *White v. Brock*, 584 P.2d 1224 (Colo. App. 1978). The only issue for the Tenth Circuit therefore was whether the breach of fiduciary duty and punitive damages claims were made in good faith.[3] The relevant portion of its decision, although brief, demonstrates that it fully considered the issue and correctly applied the *St. Paul Mercury* standard:

> We hold that at the time the case was commenced the court had jurisdiction. An adjustment of the dollar figures during the proceedings did not divest the court of jurisdiction.
>
> Upon close scrutiny there is nothing to show that the punitive damages claim was not made in good faith under *St. Paul Mercury* . . . .

749 F.2d at 1441 (citations omitted) (Appendix A-2-8). By no stretch of the imagination was the Tenth Circuit's ruling "an open invitation for plaintiffs to use legally invalid punitive damage claims to 'shoehorn' their state law actions into federal court," as petitioners would have the Court believe. Petition at 14. Petitioners' insistence otherwise derives from both excessive advocacy and a flawed understanding of *St. Paul Mercury*.

As the Tenth Circuit recognized, the rationale underlying

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[3]Significantly, petitioners no longer assert, as they did in the district court and before the Tenth Circuit, that the punitive damages claim was not made in good faith. Instead, they now argue, for the first time, that the determination by the Tenth Circuit (seven years after the action was filed) that the breach of fiduciary duty claim was invalid must as a matter of law divest the district court of jurisdiction. In essence, petitioners are attempting to rewrite the rule of *St. Paul Mercury* so that legal certainty, at whatever point determined, makes objective good faith at the time of filing the action irrelevant—an issue never raised below. The petition could be denied on this basis alone.

this Court's reasoning in *St. Paul Mercury* is especially applicable to the circumstances of this action. Where a claim has been asserted in objective good faith, considerations of judicial economy and fairness to the parties dictate that the action not be dismissed if it is determined at some later point that plaintiff cannot recover an amount sufficient to satisfy the amount in controversy requirement. The district court here not only determined that the prayer for punitive damages was made in good faith (and therefore would be counted for purposes of satisfying the amount in controversy requirement), but also submitted the claim to the jury, which awarded $13.6 million in punitive damages. What could be better evidence of the growers' good faith than that both the district court and the jury found the fiduciary duty and the punitive damages claims to be valid?

It was not until six years after the punitive damages claim was alleged that the Tenth Circuit, reviewing the claim on appeal, first held that the breach of fiduciary duty claim was invalid. Even then, however, the Tenth Circuit, after "close scrutiny," 749 F.2d at 1441 (Appendix A-2-8), found that respondent's breach of fiduciary duty and punitive damages claims were asserted in good faith. The Tenth Circuit correctly recognized that the fact that it had declared the breach of fiduciary duty claim invalid did not of necessity mean that the invalidity of that claim was apparent to a legal certainty at the time the growers initiated this action.[4] Moreover, the Tenth Circuit certainly recognized the incalculable advantages in economy and fairness

[4]It should be noted as well that the growers asserted a federal question claim under the Commodities Exchange Act which conferred jurisdiction without regard to the amount in controversy. The existence of this claim is another indication that the punitive damages claim was not made solely to confer jurisdiction.

of having the case retried before the same Judge and under the same procedural and evidentiary rules. *Cf. Rosado v. Wyman,* 397 U.S. 397, 403-05 (1970) (no reason to defeat the commonsense policy of pendent jurisdiction by requiring jurisdiction over primary claim at all stages as a prerequisite to resolution of pendent claims); *Cenco v. Seidman & Seidman,* 686 F.2d 449 (7th Cir.) (where federal claim dismissed on appeal, considerations of judicial economy which underlie pendent jurisdiction doctrine support retention of pendent state claims for retrial before same judge), *cert. denied,* 459 U.S. 880 (1982). Indeed, since many class members (including respondent) had the requisite amount in controversy without counting any punitive damages claim, this action will continue in federal court regardless of the jurisdictional ruling. Under these circumstances, it would hardly be sound management of judicial resources to force the maintenance of five parallel suits in state courts by "ousted" class members.

II.

The Decision Of The Tenth Circuit Is In Accord With The Decisions Of Other Circuits

The decisions of other Courts of Appeals are in accord with the Tenth Circuit in their application of the rule of *St. Paul Mercury,* as evidenced by the cases cited by petitioners. Indeed, those cases uniformly rely on an objective determination, using the criteria set forth in *St. Paul Mercury,* of whether the plaintiff was in good faith in making the disputed claim. *See, e.g., Wiggins v. North American Equitable Life Assurance Co.,* 644 F.2d 1014, 1017 (4th Cir. 1981) ("the legal impossibility of recovery must be so cer-

tain as virtually to negative the plaintiff's good faith in asserting the claim"); *Burns v. Anderson,* 502 F.2d 970 (5th Cir. 1974) (holding that dismissal by district court was proper because claim could not have been made in good faith); *Nelson v. Keefer,* 451 F.2d 289, 292 (3d Cir. 1971) (holding that dismissal is proper only in "flagrant cases" where it can be determined *in advance* to a legal certainty that the amount in controversy requirement cannot be satisfied); *McDonald v. Patton,* 240 F.2d 424, 426 (4th Cir. 1957) ("If the right of recovery is uncertain, the doubt should be resolved, for jurisdictional purposes, in favor of the subjective good faith of the plaintiff").

Good faith has been found lacking only in circumstances where it was clear at the time the claim was made that it was legally or factually invalid. *See, e.g., Morris v. Hotel Riviera, Inc.,* 704 F.2d 1113 (9th Cir. 1983) (statute on its face limited recovery to less than $10,000); *Wood v. Citronelle-Mobile Gathering System Co.,* 409 F.2d 367 (5th Cir. 1968) (punitive damages unavailable because of collateral estoppel effect of prior state court ruling and state law precluding such damages in breach of contract actions); *Nixon v. Loyal Order of Moose Lodge No. 750,* 285 F.2d 250 (4th Cir. 1966) (damages provision of written contract limited recovery to less than $10,000). In similar circumstances the Tenth Circuit has also found good faith to be lacking. *See, e.g., Kalpakian v. Oklahoma Sheraton Corp.,* 398 F.2d 243 (10th Cir. 1968) (statute limited recovery).

In many of the cases cited by petitioners, the district court itself found good faith to be lacking and dismissed the action prior to trial. *See, e.g., Kahal v. J. W. Wilson & Associates, Inc.,* 673 F.2d 547 (D.C. Cir. 1982) (affirming

dismissal by district court because as a matter of law facts pleaded insufficient to support award of punitive damages); *Burns v. Anderson*, 502 F.2d at 972 (affirming dismissal by district court because clear that original claim could not have been made in good faith). Even in *Zahn v. International Paper Co.*, with which petitioners suggest the Tenth Circuit's ruling was at odds, the district court had held at the class certification stage that it was convinced to a legal certainty that not every class member had suffered damages in excess of $10,000. 414 U.S. at 292. By contrast, the district court here applied the legal certainty test, determined that the breach of fiduciary duty claim and the prayer for punitive damages were brought in good faith, and subsequently agreed that the claims were in fact valid.

None of the cases cited by petitioners has held that it is improper under *St. Paul Mercury* to remand an action for retrial where, as here, a claim which was originally brought in good faith is later determined to be invalid. *Cf. Rosado v. Wyman*, 397 U.S. at 405 n.6 (commonsense policy of pendent jurisdiction is "persuasive analogy" to "well-settled" rule of *St. Paul Mercury*).[5] The case law holds uniformly that so long as the initial claim was made in good faith, as measured by the *St. Paul Mercury* standard, the absence of the potential on retrial to recover the jurisdictional

[5]Although the court below did not base its decision on the doctrine of pendent jurisdiction, it is clear that because respondent's claim under the Commodities Exchange Act was not plainly insubstantial the district court had the power to exercise pendent jurisdiction over the remaining state law claims after dismissal of the CEA claim. *See Rosado v. Wyman*, 397 U.S. at 403-05. The same factors of judicial economy and fairness to the litigants central to the *St. Paul Mercury* rule would militate in favor of the exercise of jurisdiction over all class members in the retrial of this case under the doctrine of pendent jurisdiction.

amount does not defeat jurisdiction to retry the remaining claims. In sum, the Tenth Circuit and other lower courts have correctly applied the rule that once the district court has specifically found that the claim was brought in good faith, jurisdiction attaches and is not ousted by subsequent rulings unless and until the district court's finding of good faith is specifically reversed.

III.

The Tenth Circuit Was Never Asked To—And Did Not —Determine To A Legal Certainty That The Growers Cannot Recover Punitive Damages

Wholly aside from the issue of the growers' good faith in asserting the breach of fiduciary duty claim and the punitive damages prayer, the writ should be denied because the premise on which the petition rests—that it has been "determined to a legal certainty that a plaintiff cannot recover punitive damages"—simply is not true. Petitioners never directly asked the Tenth Circuit to declare that to a legal certainty punitive damages were never recoverable in this action under any theory. In fact, the Tenth Circuit was quite careful to indicate that Colorado law may allow punitive damages in those contract actions involving "egregious circumstances." 749 F.2d at 1441 (Appendix A-2-7). Indeed, the Colorado Supreme Court presently has pending before it a case requiring it to decide the extent to which punitive damages may be recovered in a breach of contract action. *Podleski v. Mortgage Finance, Inc.*, 709 P.2d 19 (Colo. App.), *cert. granted*, (Colo. Nov. 4, 1985) (No. 85-264). Given the evidence at the first trial of the defendants' malice, insult and wanton and reckless disregard of the

growers' rights and feelings, and the jury's findings, it is likely that the growers may be able on retrial to establish sufficiently egregious circumstances to justify an award of punitive damages. *See Bell v. Preferred Life Assurance Society*, 320 U.S. at 242 (under applicable state law it could not be said to a legal certainty that sufficient punitive damages were not recoverable). Indeed, respondent has already advised the district court and petitioners that it will seek punitive damages upon the retrial of this case.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: June 18, 1986

Respectfully submitted,

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